

JUN 3 1976

MICHAEL RODAK, JR., CLERK

In The  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

**No. 75-1627**

JACKSON COUNTY, MISSOURI, KANSAS CITY,  
MISSOURI, AND THE OFFICE OF PUBLIC COUN-  
SEL OF THE STATE OF MISSOURI,

*Petitioners,*

vs.

THE PUBLIC SERVICE COMMISSION OF MIS-  
SOURI AND MISSOURI PUBLIC  
SERVICE COMPANY,

*Respondents.*

RESPONDENT MISSOURI PUBLIC SERVICE  
COMPANY'S BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE  
OF MISSOURI

GARY J. BROUILLETTE

1700 Commerce Tower  
Kansas City, Missouri 64105  
(816) 471-5677

JUDITH PAXTON REA

10700 E. 50 Highway  
Kansas City, Missouri 64138  
(816) 353-5042

*Attorneys for Respondent, Mis-  
souri Public Service Company*

## TABLE OF CONTENTS

Statement of the Case .....	1
Reasons for Denying the Writ .....	2
Argument .....	3
Conclusion .....	9

## Table of Authorities

### CASES

<i>Bell v. Burson</i> , 402 U.S. 525 (1971) .....	5
<i>Black v. Cutter Laboratories</i> , 351 U.S. 292 (1956) .....	4
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954) .....	8
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970) .....	7
<i>Flemming v. Nestor</i> , 363 U.S. 603 (1960) .....	8
<i>Howe v. City of St. Louis</i> , 512 S.W.2d 127 (Mo. 1974) .....	7
<i>Jennings v. Mahoney</i> , 404 U.S. 25 (1971) .....	5
<i>Lichter v. U. S.</i> , 334 U.S. 742 (1948) .....	7
<i>Lynch v. New York</i> , 293 U.S. 52 (1934) .....	6
<i>McDonald v. Board of Education</i> , 394 U.S. 802 (1969) .....	7
<i>Opp Cotton Mills v. Administrator of the Wage and Hour Division</i> , 312 U.S. 126 (1941) .....	7
<i>Pope v. Ullman</i> , 367 U.S. 497 (1961) .....	3
<i>Richardson v. Belcher</i> , 404 U.S. 78 (1971) .....	7
<i>State ex rel. Chicago, R.I. &amp; P. R.R. Co. v. Public Service Commission</i> , 312 S.W.2d 791 (Mo. 1958) .....	8
<i>Texas v. Interstate Commerce Commission</i> , 258 U.S. 158 (1922) .....	3
<i>Wilson v. Cook</i> , 327 U.S. 474 (1946) .....	6
<i>Yakus v. U. S.</i> , 321 U.S. 414 (1944) .....	7

**CONSTITUTIONAL PROVISIONS  
AND STATUTES**

Constitution of the United States—

Article III, Section 2 .....	2, 3
Fifth Amendment .....	8
Fourteenth Amendment .....	7, 8
Section 393.270, R.S. Mo. 1969 .....	6

In The  
**Supreme Court of the United States**  
**OCTOBER TERM, 1975**

**No. 75-1627**

JACKSON COUNTY, MISSOURI, KANSAS CITY,  
MISSOURI, AND THE OFFICE OF PUBLIC COUN-  
SEL OF THE STATE OF MISSOURI,

*Petitioners,*

vs.

THE PUBLIC SERVICE COMMISSION OF MIS-  
SOURI AND MISSOURI PUBLIC  
SERVICE COMPANY,

*Respondents.*

**RESPONDENT MISSOURI PUBLIC SERVICE  
COMPANY'S BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE  
OF MISSOURI**

**STATEMENT OF THE CASE**

This respondent is in substantial agreement with the statement of the case set forth in petitioners' brief (which includes the chronology set forth in the Missouri Supreme Court Opinion, 532 S.W.2d at 22-3, fn. 1, App. C to petitioners' brief), but believes the following additional facts are pertinent.

On November 13, and December 17, 1974, pre-hearing conferences were held before the Public Service Commission of Missouri (hereinafter referred to as

"PSC") for the purpose of allowing intervenors, staff of PSC, Office of the Public Counsel (hereinafter referred to as "Public Counsel") and Missouri Public Service Company (hereinafter referred to as "MPS") to discuss the development of issues to be presented to the PSC.

On January 31, 1975, the PSC issued its order requiring MPS to notify its customers of the requested rate increase. The order of the PSC set forth the form of notice which outlined the requested increase in rates and contained directions to each consumer that comments pertaining to the rate increase request should be sent to the Public Counsel, Box 386, Jefferson City, Missouri 65101. This notice was imprinted on each consumer's monthly billing.

In addition, public hearings were held in the service area of MPS on April 2, 3 and 4, 1975, to which the public was invited, via newspaper publication of the hearings, to present any matter pertaining to the proposed rate increases.

#### REASONS FOR DENYING THE WRIT

1. This case does not present a question deserving the attention of this Court. It is obvious from the statement of facts that individual notice of the electric rate increase was given to each of the consumers of MPS and extensive public and evidentiary hearings were held *before* the PSC authorized an increase in the price charged for electrical service to consumers of MPS. As a result, there is no "case" or "controversy" within the meaning of Article III, Section 2, of the Constitution of the United States.

2. There is no conflict between the decision of the Missouri Supreme Court and any other decision ren-

dered by the United States Supreme Court with regard to matters raised by petitioners.

3. The decision of the Missouri Supreme Court correctly applied the statutes of the State of Missouri involved herein.

#### ARGUMENT

A threshold, indispensable prerequisite for review by this Court is the existence of a "case" or "controversy" within the meaning of Article III, Section 2, Clause 1 of the United States Constitution. Various decisions of this Court have denied review because of the lack of "standing", "ripeness", and various other components determinant of whether a "case or controversy" exists. In *Texas v. Interstate Commerce Commission*, 258 U.S. 158 (1922), the Court stated:

"It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute, that its validity may be called in question by the suitor and determined by an exertion of the judicial power." (l.c. 162)

This Court has further stated that it ". . . can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here." *Poe v. Ullman*, 367 U.S. 497 (1961), at pg. 504.

Petitioners herein fail to show that they were in fact affected prejudicially by the application or enforcement of the very statutes they challenge before this

Court. The indisputable facts of this case (as recited in petitioners' brief, as well as the statement of facts recited herein), are that each consumer of MPS received "notice" of the requested rate increase. Additionally, "hearings", both public and evidentiary, were held a minimum of seventeen (17) days during which petitioners participated.

Petitioners assert (Petition, pg. 12) that the decision of the Missouri Supreme Court held "... that a consumer *may* be permanently deprived of the right to utility service at a just and reasonable rate, a right created by the legislature, without notice and without an opportunity for some type of hearing." (Emphasis added) The facts of this case, however, reflect that before any increase in electric rates was authorized by the PSC, individual notice to consumers and lengthy hearings actually occurred.

This Court should not review matters premised upon an expectancy that something "may" occur given the statutory framework of the particular state, when in fact, what "may" have occurred *did not occur* in the case at issue. This Court has promulgated long-standing and numerous opinions and precedent rejecting review when it was clearly established that the urging of unconstitutionality of a statute or statutes was absent a showing of injury or a showing that the statutes were unconstitutionally applied to the disadvantage of one seeking review. The Court reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956). Nor is it enough to have involved a substantial federal question (which this respondent denies is present in this proceeding), for this Court will not decide important and difficult constitutional issues devoid of any factual content which supports the chal-

lenge of unconstitutionality. In *Jennings v. Mahoney*, 404 U.S. 25 (1971), the Court held, that while there was a substantial question whether Utah's statutory scheme afforded procedural due process to petitioner in the suspension of her driver's license, that question did not arise since the Utah courts had in fact afforded the motorist such procedural due process. The *Jennings* case, *supra*, was not in conflict with the case of *Bell v. Burson*, 402 U.S. 525 (1971) and like authority cited by the petitioners herein. In discussing the fact that there was plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by *Bell v. Burson*, *supra*, the Court in *Jennings*, *supra*, stated:

"This case does not, however, require that we address that question. The District Court in fact afforded this appellant such procedural due process. That Court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine." (l.c. 26)

This is precisely the issue before this Court and the analogous facts dictate that this Court deny petitioners' writ. As in the *Jennings* case, *supra*, petitioners herein, in numerous forums and on numerous occasions were afforded procedural due process. (See again the chronology of events in this matter set forth in the Missouri Supreme Court opinion, 532 S.W.2d at 22-3, fn. 1, App. C to petitioners' brief.)

Additionally, this respondent submits that the decision of the Missouri Supreme Court was premised upon State grounds in that it held "... the trial court erred when it reversed the Report and Order in No.

18,180 for failure of the Commission to proceed under Section 393.270."<sup>1</sup> (532 S.W.2d 20, at pg. 29) It was only after this conclusion that the Missouri Supreme Court continued on to decide due process and equal protection arguments raised by petitioners herein. This respondent submits that such further discussions were not necessary to the holding of the Missouri Supreme Court. In this respect, this Court is well aware of the jurisdictional requirement that there be drawn into question before the highest state court the validity of a state statute on federal grounds before the United States Supreme Court may exercise jurisdiction and that requirement is satisfied only if the record shows that the question of validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the State or has been decided by it and that its decision was necessary to the judgment. *Wilson v. Cook*, 327 U.S. 474 (1946).

Petitioners' writ should also be denied even if we assume for the moment, arguendo, that the Missouri Supreme Court decision rests upon both state and federal grounds. In the oft-followed decision of this Court, *Lynch v. New York*, 293 U.S. 52 (1934), this Court stated where arguably the judgment of the state court rests on two grounds, one involving a federal question and the other not, the Court would not take the case.

Petitioners have also asserted that the decision of the Missouri Supreme Court is in conflict with decisions of this Court on matters alleged to be at issue in this proceeding. Without a reiteration of matters already

comprehensively briefed and before this Court, it is necessary that this bare assertion be dispelled. With regard to the notice and hearing requirements to satisfy the due process provisions of the Fourteenth Amendment to the United States Constitution, this Court has held that it is not necessary that there be a hearing at the initial stage or at any particular point, or at more than one time in any proceeding, so long as a hearing is held before the order becomes effective. *Opp Cotton Mills v. Administrator of the Wage and Hour Division*, 312 U.S. 126 (1941); *Lichter v. U. S.*, 334 U.S. 742 (1948). Nor is there any constitutional requirement that the validity of an administrative regulation be tested in one tribunal rather than in another so long as there is an opportunity to be heard and provisions for judicial review are available to satisfy the demands of due process. *Yakus v. U. S.*, 321 U.S. 414 (1944).

With regard to the equal protection argument asserted by petitioners herein, it is especially important to note that the Missouri Supreme Court based its decision upon its holding in *Howe v. City of St. Louis*, 512 S.W.2d 127 (Mo. 1974), which held that the equal protection clause did not forbid a state from creating classes in the adoption of regulations under its police power, but instead precludes only that done without any reasonable basis and in a manner which would constitute arbitrary and invidious discrimination. The *Howe* decision, supra, is entirely in accord with the decision of this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970), which was based, in part pertinent to the discussion herein, on *McDonald v. Board of Education*, 394 U.S. 802 (1969) and followed in *Richardson v. Belcher*, 404 U.S. 78 (1971), all holding that a statu-

---

1. All statutory references are to R.S. Mo. 1969, unless otherwise specified.

tory classification is consistent with the equal protection clause of the Fourteenth Amendment if it is rationally based and free from invidious discrimination. Even further, this Court has held that if the classification meets the test of the equal protection clause of the Fourteenth Amendment, it is perforce consistent with the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Flemming v. Nestor*, 363 U.S. 603 (1960).

Lastly, the Missouri Supreme Court correctly applied the statutes of the State of Missouri involved herein. The very formidable task of regulating public utilities had been delegated primarily and exclusively to the PSC in the State of Missouri. The reasons are quite obvious since there is an absolute need for a continued form of regulation depending upon the existence of circumstances at any given time. In addition, there is a great need for a level of expertise which will allow the necessary understanding of the plethora of exigencies facing public utilities and consumers alike. The Missouri Supreme Court correctly understood the need for the existence of the PSC and recognized the totality of circumstances that naturally arise in providing utility services to consumers. In fact, the Court stated (quoting from *State ex rel. Chicago, R.I. & P. R.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. 1958)) that:

" 'Its [commission's] supervision of the public utilities of this State is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion may deem to be in the public interest.' To rule otherwise would make Section

393.270 (3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers. See, *McGraw v. Missouri Pacific Ry. Co.*, 230 Mo. 496, 132 S.W. 1076 (1910)." (532 S.W.2d at pgs. 29, 30)

The Court properly reversed and remanded the decision of the Jackson County Circuit Court after comprehensively reviewing all issues raised by petitioners herein. Perhaps the concurring opinion of Judge Bardget provides the best summary of what occurred in this case. Judge Bardget states that he concurs "... because in this case there was, *in fact*, knowledge on the part of the parties interested in the proposed increased rates and there was a full hearing conducted with reference to those proposals." (Petition, pg. A33) (Emphasis added)

## CONCLUSION

The decision of the Missouri Supreme Court is clear and unambiguous. That decision followed the ruling of all the cases that are in point. Petitioners assert no valid ground for review by this Court. There are neither special nor important reasons for this Court to exercise its discretion in reviewing the decision of the Missouri Supreme Court. As has been set forth above, the decision of the Missouri Supreme Court does not conflict with the decisions of this Court on matters raised by petitioners herein. Since this case does not

present a question deserving of the attention of this Court, the petition should be denied.

Respectfully submitted,

GARY J. BROUILLETTE

1700 Commerce Tower  
Kansas City, Missouri 64105  
(816) 471-5677

JUDITH PAXTON REA

10700 East 50 Highway  
Kansas City, Missouri 64138  
(816) 353-5042